ADDITIONAL VIEWS OF SENATOR RICHARD J. DURBIN

Senate Governmental Affairs Committee
Special Investigation
March 5, 1998

I concur in the Minority Report, its Findings and Recommendations, and the Responses of the Minority to the Majority Report.

In reflecting on the special investigation into the 1996 Federal campaign undertaken by this Committee and its place in history, I offer these observations.

From the outset, I approached my responsibilities as a member of this Committee with the hope that our investigation would be open and bipartisan. I am disappointed that balance and fairness were not achieved, and that our investigation became an inquiry driven more often by partisan politics than objective deliberation.

As the investigation ensued, I hoped that public exposure of just how suspect and tawdry our campaign financing system had become would be a catalyst for change. Regrettably, despite a compelling body of evidence to justify comprehensive reform, the United States Senate, for the second time in six months, recently thwarted reasonable efforts to reform the system. The few Republican Senators who supported reform, including Chairman Thompson and Senators Susan Collins and Arlen Specter of this Committee, deserve special recognition for resisting their leadership's defense of the status quo.

Beyond the substantive issue of campaign finance reform, I am concerned that this investigation has damaged the procedural powers of the Senate in one particular respect. The failure of the Committee to confront the refusal of some entities to respond to the committee's directives to produce documents, appear for depositions, or respond to questions is troubling.

Part VII of the Minority Report describes in detail the increasing difficulties encountered as we attempted, in the face of resistance and obstruction, to gather critical facts necessary to examine the allegations of illegal and improper fundraising practices in the 1996 election campaign.

What is equally distressing is that not only were subpoenas not enforced, the lack of compliance itself became the rationale for the Majority's refusal to issue additional subpoenas sought by the Minority.[1]

Well before the issuance of a subpoena to the AFL-CIO (which the Majority unfairly

[1]Hearing Transcript, October 8, 1997, p. 67, lines 1-3 "Chairman Thompson: Well, we are not going to issue subpoenas--continue to issue subpoenas when certain people are thwarting the ones that are already out there."

blames for stimulating widespread refusal of other entities to respond) several Republican-affiliated groups began to openly resist the Committee's subpoenas. Ultimately, well over 30 organizations of both political persuasions refused to comply with subpoenas issued by the Committee. Not only did the Committee meet opposition from subpoenaed entities, the Minority faced repeated resistance by the Majority to even discuss our requests that we institute action to ensure that all Committee subpoenas be obeyed.[2]

No meaningful action to counter these early challenges to the Committee's subpoenas occurred. Such efforts may have prevented the contagious resistance the Committee faced. Failure to act promptly and aggressively may have signaled that if one simply resisted the Senate's request, no consequences would follow.

Had the Committee promptly instituted enforcement action to compel compliance at the first sign of balking, we may have obtained much more of the evidence sought. In addition, had the committee sought a declaratory ruling from the court on objections raised to the breadth and scope of our requests, we may have obtained guidance to settle the discovery disputes, which even now, remain unresolved. Furthermore, had any judicial enforcement processes the Committee might have instituted become protracted, there may have been some justification for seeking an extension of time to continue our probe. But those possibilities, unfortunately, are things about which we can only speculate.

The Majority Report ascribes blame for not enforcing the subpoenas on the cutoff date and what it deems "lengthy and arduous procedures" for contempt. I cannot accept the argument tendered in the Majority's Report that because contempt procedures are time-consuming, future investigations must be free of arbitrary time deadlines in order to accommodate possible noncooperative witnesses.

While the Majority posits that the cutoff in S. Res. 39 was a hindrance, its actions reflected that it had little interest in meaningful enforcement. It failed to aggressively confront the obstructionists, continuing to cite the deadline as a reason for inaction. That argument falters when measured against the fact that (1) the full Senate unanimously approved a specific end point, (2) the Majority continued to delay its approval of Minority requested subpoenas throughout the course of the hearings, (3) the Committee never took advantage of the statutory civil contempt procedures available to address noncompliance with its discovery requests, and thus, there is no evidence as to how much time any such enforcement may have taken; and (4) the Chairman's decision to suspend public hearings fully two months before the December 31 deadline, which gave the impression that the Majority had nothing more to present and that any claimed need for additional time beyond year-end had disappeared.

---

[2]Hearing Transcript, October 7, 1997, p. 22, lines 8-24; Hearing Transcript, October 7, 1997, p. 31, line 23 to p. 32, line 9; Hearing Transcript, October 8, 1997, p. 65, line 12 to p. 75, line 22

Instead of continuing to engage in futile negotiations with recalcitrant entities that claimed that the subpoenas were overbroad, the Committee should have mounted an assertive response, such as seeking a declaratory judgment. Federal law provides a remedy that may have satisfied both the Committee's objective of obtaining information and entities' collective desire to test the validity of our requests.[3] Indeed, if there were legitimate concerns about the scope and breadth of matters inquired into or challenges to information sought in the subpoenas, the proper forum for evaluating the propriety of the requests is the Federal District Court for the District of Columbia.

Seeking contempt and submitting questions on the propriety of our requests for judicial resolution once attempts to secure voluntarily compliance had broken down would have been, in my estimation, a preferred course of action. To claim that there was inadequate time to present and resolve such matters before the Committee's work period expired is weak. It appears that interest in obtaining the information sought was not paramount.

Instead, like the recalcitrant groups resisting the Committee's requests, the Committee just watched the clock run down. Not only did we end in a stalemate with noncooperative groups and fail to gain the information we sought, we may have discredited the Senate's investigative authority.

In January 28, 1997 floor remarks, Chairman Thompson quoted a passage from the leading Supreme Court case on the power of Congress to investigate as a necessary component of its power to investigate.[4] What the Court went on to explain was that:

> *"Experience has taught that mere requests for ...information often are unavailing and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry--**with enforcing power*** [emphasis supplied] *was regarded and employed as a necessary and appropriate attribute of the power to legislate--indeed, it was treated as inhering in it. There is ample warrant for*

---

[3] 2 U.S.C. §§288b(b) and 288d; 28 U.S.C. §1365(a); CRS Report No. 86-83A. The Senate may "ask a court to directly order compliance [a] subpoena or order or may merely seek a declaration concerning the validity of the subpoena or order. By first seeking a declaration, [the Senate would give] the party an opportunity to comply before actually [being] ordered to do so by a court." S. Rept. No. 95-170, 95th Cong., 1st Sess. 89 (1977). It is within the discretion of the Senate whether or not to use such a two-step enforcement process. Id. at 90. Regardless of whether the Senate seeks enforcement of, or a declaratory judgment concerning a subpoena, the court will first review the subpoena's validity. Id. at 41.

[4] McGrain v. Daugherty, 273 U.S. 135 (1927)

thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised."[5]

In the interest of the Senate as an institution, the Committee should have been more vigilant in safeguarding the integrity of the investigative process and powers of Congress and cognizant of the potential for damaging ramifications of not invoking sanctions.

Our failure to take appropriate enforcement action in the discovery phase of this investigation may have repercussions far more enduring than simply the inability of this Committee to obtain the evidence it sought to fully probe questionable campaign practices in the 1996 Federal election cycle. The damaging precedent we have now established could affect the Senate as an institution, as its Committees continue to exercise their oversight authority and attempt future investigations.

Any future probes of the magnitude of the one we have just concluded must be guided by the lessons of our experience. To uphold the integrity of the Senate's power to investigate, reasonable requests for information within the clear scope of the investigation must be made and deliberate acts of obstruction must be promptly addressed.

Finally, I would associate myself with the Additional Views of Senator Daniel K. Akaka.

At the outset of this investigation, Senator Akaka cautioned this Committee not to judge Asian-Americans based on any wrongdoing by a few. His eloquent plea was heeded by most Members most of the time.

But the Majority Report may well have crossed the line by characterizing some Asian-American donors and fundraisers as possibly "foreign agents." Without convincing evidence, the loyalty of several Asian-Americans is questioned in that report. It is difficult to imagine a more serious and damaging charge against any American.

History will judge whether these charges by the Majority are warranted. In the name of fairness, I hope that this Committee and the U.S. Senate are prepared to make a public apology to those charged with disloyalty should the evidence show otherwise.

---

[5] McGrain v. Daugherty, 273 U.S. 135, 175 (1927)